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In the Supreme Court of the United States

October Term, 1972
No. 72-1707

INTERNATIONAL WIRE,
Petitioner,

vs.

LOCAL 38, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT, LOCAL 38, IBEW, IN OPPOSITION

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QUESTION

Whether the Court of Appeals properly held a Board decision constituted collateral estoppel in a Section 303 case, on findings by the District Court, first, that the issues before the Labor Board in an 8(b)(4) charge and the issues in the Section 303 action were the same, second, that the Board decision was not shown to be unsupported by substantial evidence and third, that there was not any contention that petitioner was denied a full and fair hearing at the administrative level.

STATEMENT

The statement contained in the petition is sufficient.

ARGUMENT

A. This Decision of the Sixth Circuit Does Not Contravene the Statute, the Intent of Congress Nor a Decision of This Court.

Petitioner does not question the principle of law followed by the District Court and the Court of Appeals herein that decisions of administrative agencies may preclude litigation of the same factual issues in a court of law as enunciated in *U. S. v. Utah Construction and Mining Co.*, 384 U.S. 394 (1966), yet contends that Section 303 cases are somehow cut out from this principle (Petition, page 7). However, petitioner's quotations from Senator Taft and the *International Longshoreman's and Warehouseman's Union v. Juneau Spruce Corp.*[1] case (Petition, pages 8 & 9) do not support this contention. The Senator did wish to and did provide for two remedies for secondary boycotts, one, a labor board cease and desist order and two, damages in a Section 303 suit.

This Court in *Juneau Spruce, supra,* decided before *Utah Construction, supra,* did not in any way make special rules for Section 303 cases. The actual decision in *Juneau Spruce* was whether or not damages for the unlawful picketing could accumulate from when the picketing started or only from after the picketing had been held by the Board to be an unfair labor practice. This Court held the damages started from the commencement of the picketing and then discussed Section 8(b)(4) and Section 303 saying they were identical in the conduct condemned but the fact that they specified two different remedies was strong confirmation that the remedies were to be independent of each other. Respondent has no argument with that; the remedies are independent of each other.

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1. 342 U.S. 237 (1952).

B. There Is Not a Conflict with Another Circuit.

This decision of the Sixth Circuit is not in conflict with the decision of another Court of Appeals.

The Fifth Circuit in *Painters District Council No. 38 v. Edgewood Contracting Co.*,[2] and subsequent cases has granted res judicata to 8(b)(4) decisions of the Labor Board in Section 303 cases. The Ninth Circuit in *Paramount Transport Systems v. Teamsters, Local 150*, 436 F.2d 1064 (1971) has done the same, so with the instant case three separate circuits have ruled identically. No Court of Appeals has held the opposite.

The petitioner says "The Second Circuit refuses to give effect to the Board's Section 8(b)(4) decisions" (Petition, page 11) citing *Old Dutch Farms, Inc. v. Milk Drivers and Dairy Employees Local Union No. 584*,[3] but an examination of that case shows that it is not in conflict. There the sole issue was whether the court would stay all proceedings in the Section 303 action *pending arbitration*; then the court in footnote 7 cited *Juneau Spruce, supra*, and added the following dictum:

> "Moreover, an administrative determination such as the one involved here, does not bind a court confronted with the question of whether particular union activity violated Section 8(b)(4) in a Section 303 suit."

Four years later, in 1970 the same court in *Safir v. Gibson*, 432 F.2d 137 (1970), followed *Utah Construction, supra*, and held res judicata applies where administrative agencies have resolved issues of fact. This did not involve a Labor Board decision but, it is now far from certain that the Second Circuit will except Section 303 cases from

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2. 416 F.2d 1081 (1969).

3. 359 F.2d 598, *cert. denied*, 385 U.S. 832 (1966).

the *Utah Construction* doctrine when the appropriate case is before it.[4] So at this point the *Old Dutch Farms* decision is not in conflict with the above decisions in the Fifth, Sixth and Ninth Circuits.

C. The Doctrine Enunciated by This Court Was Properly Applied by the Sixth Circuit.

This Court in *Utah Construction, supra,* said:

> "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the Courts have not hesitated to apply *res judicata* to enforce repose."

And it said as to the case before it:

> ". . . the factual disputes resolved were clearly relevant to issues properly before it, and both parties had a full and fair opportunity to argue their version of the facts and an opportunity to seek court review of any adverse findings. There is, therefore, neither need nor justification for a second evidentiary hearing on these matters already resolved as between these two parties."

The Sixth Circuit in the instant case said:

> "A full hearing was held before the NLRB trial examiner. The trial examiner and the Board found that no unfair labor practice, as charged in the complaint, had been proved and dismissed the complaint.

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4. The Sixth Circuit in *Riverton Coal Co. v. United Mine Workers,* 453 F.2d 1035, *cert. denied,* 92 Sup. Ct. 2439 (1972), contained almost the identical dictum as *Old Dutch Farms* did; it read: "We do not regard the decisions of the Board as controlling on us in damage actions under Section 303." In the instant case the court did not even mention its dictum in *Riverton.*

Therefore appellee [respondent herein] filed a motion for summary judgment in the District action, asserting that under the determination by the Board, appellant's Section 303 complaint was either barred by the doctrine of res judicata or appellant was collaterally estopped from denying the findings and conclusions of the NLRB.

In two well-reasoned memorandum opinions which dealt appropriately with the authorities relied upon by the appellant, the District Judge found that the issues before the Labor Board and the issues in the instant action were identical. He found the Labor Board decision had become final and no petition to review same had been filed by appellant in this court, as provided by law.[5]

He also found that there was no contention in this case that plaintiff had been denied a full and fair hearing at the administrative level. He thereupon granted the motion for summary judgment dismissing plaintiff's complaint.

We believe the doctrine of collateral estoppel applies to bar this Section 303 action under the reason-

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5. The Petitioner claims it failed to have the NLRB decision reviewed by the Court of Appeals because its business had been destroyed (Petition, page 11). The pleadings in this case in District Court disprove such a claim: The Board decision was rendered in April 1971 and Petitioner then could have appealed to the Court of Appeals for a review of the Board's decision. It did not do so and in Interrogatories it answered in this suit on December 14, 1971, eight months later, it not only did *not* state it was out of business but listed its sales through December 31, 1971 showing six contracts currently in operation at that time in Cleveland, Akron, and Toledo, Ohio, in Pokomo, Indiana, Champagne, Illinois and Pompano, Florida. So it was still in business over eight months after the time for filing its appeal in the Court of Appeals. Therefore it was not shut down and that was not its reason for *not* asking the Court of Appeals to review the Board decision.

ing set forth in the Memorandum of Opinions of the District Judge and under the authority cited by him therein. *United States v. Utah Construction and Mining Company*, 384 U.S. 394 (1966); *Tipler v. duPont Company*, 443 F.2d 125 (6th Cir., 1971)."

Thus this decision is in line with *Utah Construction*.

Further this Court in *Utah Construction* quoted with approval from the dissenting decision in the lower court in footnote 18 and stated:

"Where there is some good reason for a new judicial inquiry into the same acts, however, the courts will not view the administrative findings as final."

The Sixth Circuit in *Tipler v. E. I. duPont Co.*, 443 F.2d 125 (1971) felt there was a reason for a "new judicial inquiry into the same acts" where in a Title VII case under the Civil Rights Law of 1964, it refused to apply collateral estoppel to a Labor Board decision involving the same parties because, as the Court said:

"As a result of the variant standards of these statutes, the NLRB hearing did not adequately consider the factors necessary for a Title VII violation. The Trial Examiner was primarily concerned with the question whether the appellee's union activities led to his discharge. This is understandable considering that the Trial Examiner was only investigating a possible violation of the National Labor Relations Act. Consequently, he did not fully explore the racial aspects of the case before him. Had he done so, he may have been acting beyond the scope of his authority since certain acts of racial discrimination are not within the ambit of the National Labor Relations Act, even though they are proscribed by Title VII. Considering

the differences in these two acts, it would be anomalous if a finding under one should preclude a determination under the other, absent special considerations."

So the Sixth Circuit was well aware when deciding the instant case of the warning quoted above from *Utah Construction* and found no reason for a new judicial inquiry into the same acts herein.

CONCLUSION

There are not any special or important reasons for granting certiorari herein; neither is uniformity nor guidance in the administration of the Labor Management Relations Act needed nor is the national labor policy threatened.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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